

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

RICKY NGAUE,

Plaintiff,

v.

TOMMY LEWIS, *et al.*,

Defendants.

Case No. 3:19-cv-00509-MMD-CLB

ORDER

Plaintiff Ricky Ngaue, who was formerly incarcerated in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a civil rights complaint under 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis* for prisoners. (ECF Nos. 1, 1-1.) Because Plaintiff is no longer incarcerated, the Court denies Plaintiff's application to proceed *in forma pauperis* for prisoners as moot. The Court now screens Plaintiff's civil rights complaint under 28 U.S.C. § 1915A.

**I. SCREENING STANDARD**

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

1 In addition to the screening requirements under § 1915A, pursuant to the Prison  
2 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s  
3 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails  
4 to state a claim on which relief may be granted, or seeks monetary relief against a  
5 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a  
6 complaint for failure to state a claim upon which relief can be granted is provided for in  
7 Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
8 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a  
9 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend  
10 the complaint with directions as to curing its deficiencies, unless it is clear from the face  
11 of the complaint the deficiencies could not be cured by amendment. *See Cato v. United*  
12 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*  
14 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to  
15 state a claim is proper only if it is clear the plaintiff cannot prove any set of facts in support  
16 of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756,  
17 759 (9th Cir. 1999). In making this determination, the court takes as true all allegations of  
18 material fact stated in the complaint, and the court construes them in the light most  
19 favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).  
20 Allegations of a *pro se* complainant are held to less stringent standards than formal  
21 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the  
22 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must  
23 provide more than mere labels and conclusions. *See Bell Atl. Corp. v. Twombly*, 550 U.S.  
24 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient.  
25 *See Id.*

26 Additionally, a reviewing court should “begin by identifying pleadings [allegations]  
27 that, because they are no more than mere conclusions, are not entitled to the assumption  
28 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide

the framework of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

Finally, all or part of a complaint filed by an incarcerated person may be dismissed *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (*e.g.*, claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*, fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## II. SCREENING OF COMPLAINT

Plaintiff sues multiple Defendants for events that took place while Plaintiff was incarcerated at Three Lakes Valley Conservation Camp (“TLVCC”). (ECF No. 1-1 at 1.) Plaintiff sues Defendants Tommy Lewis and Raphael Brice. (*Id.* at 1-2.) Plaintiff alleges one count and seeks monetary relief. (*Id.* at 3-9.)

Plaintiff alleges the following. While Plaintiff was housed in the Wells Conservation Camp (“WCC”) and the Humboldt Conservation Camp (“HCC”), Plaintiff held a prison job with the Nevada Division of Forestry. (*Id.* at 3.) In 2018, Plaintiff was transferred to TLVCC. (*Id.*) While at TLVCC, Plaintiff met with Defendants Lewis and Brice for classification. (*Id.* at 4.) Defendants told Plaintiff that he could not work for the Nevada Division of Forestry because of Plaintiff’s face tattoos. (*Id.*) Plaintiff explained that he had previously worked for the Nevada Division of Forestry and that Plaintiff’s face tattoos were never a problem. (*Id.*) Lewis said some tattoos were okay, but Plaintiff’s face tattoos were too big. (*Id.*) In 2019, Plaintiff was transferred to the Stewart Conservation Camp, where Plaintiff was again assigned to work for the Nevada Division of Forestry. (*Id.* at 3.)

Based on these allegations, Plaintiff claims Defendants violated Plaintiff’s equal

1 protection rights. (*Id.* at 4.) In order to state an equal protection claim, a plaintiff must  
2 allege facts demonstrating defendants acted with the intent and purpose to discriminate  
3 against a plaintiff based upon membership in a protected class, or defendants  
4 purposefully treated a plaintiff differently than similarly situated individuals without any  
5 rational basis for the disparate treatment. See *Lee v. City of Los Angeles*, 250 F.3d 668,  
6 686 (9th Cir. 2001); see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).  
7 Conclusory allegations of motive are insufficient; specific, non-conclusory factual  
8 allegations are required. See *Jeffers v. Gomez*, 267 F.3d 895, 913-14 (9th Cir. 2001).

9 In *Olech*, the Supreme Court explicitly addressed “whether the Equal Protection  
10 Clause gives rise to a cause of action on behalf of a ‘class of one’ where the plaintiff did  
11 not allege membership in a class or group.” *Olech*, 528 U.S. at 564. The Court ruled in  
12 the affirmative and “recognized successful equal protection claims brought by a ‘class of  
13 one,’ where the plaintiff alleges that she has been intentionally treated differently from  
14 others similarly situated and that there is no rational basis for the difference in treatment.”  
15 *Id.*; see also *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 601 (2008) (recognizing that  
16 an equal protection claim may be maintained in some circumstances even if the plaintiff  
17 does not allege class-based discrimination, “but instead claims that she has been  
18 irrationally singled out as a so-called ‘class of one.’”).

19 However, although the Supreme Court has acknowledged the class-of-one theory  
20 of equal protection, it has held the theory applies only in certain limited circumstances; it  
21 does not apply when the state actions “by their nature involve discretionary  
22 decisionmaking based on a vast array of subjective, individualized assessments.”  
23 *Engquist*, 553 U.S. at 603 (holding that the class-of-one theory does not apply in the  
24 public employment context); see also *Morrison v. Vierra*, 804 F. App’x 774 (9th Cir. 2020)  
25 (holding that a district court properly dismissed a prisoner’s equal protection claim  
26 regarding prison employment because “the ‘class-of-one’ theory does not apply in the  
27 context of discretionary personnel decisions in public employment.”).

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1 The Court finds that Plaintiff fails to state a colorable equal protection claim.  
2 Plaintiff alleges that he was denied a job with the Nevada Forestry Division because of  
3 his face tattoos. Plaintiff does not allege that the discrimination was based on Plaintiff's  
4 membership in a protected class and appears to be bringing a claim on a "class-of-one  
5 theory." But the class of one theory does not apply in the context of public employment.  
6 See *Engquist*, 553 U.S. at 603. As such, Plaintiff cannot state a cognizable equal  
7 protection claim based on the allegation that Plaintiff was denied prison employment  
8 because of his face tattoos. The Court dismisses this claim with prejudice, as amendment  
9 would be futile.

### 10 **III. MOTION FOR SUBMISSION**

11 Plaintiff filed a motion requesting that his complaint be submitted to the Court for  
12 a decision. (ECF No. 5 at 1.) The Court construes this as a motion for the Court to screen  
13 Plaintiff's complaint. In light of this order, the Court denies Plaintiff's motion as moot.

### 14 **IV. CONCLUSION**

15 For the foregoing reasons, it is therefore ordered that Plaintiff's application to  
16 proceed *in forma pauperis* (ECF No. 1) is denied as moot.

17 The Clerk of Court is further direct to file Plaintiff's Complaint (ECF No. 1-1) and  
18 send Plaintiff a courtesy copy of the Complaint.

19 It is further ordered that Plaintiff's Complaint (ECF No. 1-1) is dismissed in its  
20 entirety with prejudice for failure to state a claim.

21 It is further ordered that Plaintiff's motion to submit the complaint (ECF No. 5) is  
22 denied as moot.

23 It is further ordered that the Court certifies any *in forma pauperis* appeal from  
24 this order would not be taken "in good faith" under 28 U.S.C. § 1915(a)(3).

25 The Clerk of Court is further directed to enter judgment in accordance with this  
26 order and close this case.

27 DATED THIS 19<sup>th</sup> Day of October 2020.

28   
MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE